IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 977 of 1993
With
CRIMINAL APPEAL No. 1235 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH Sd/-
HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

1 to 5 NO

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AZGARBHAI S ZALORI - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :
MR HN JHALA for Appellant(s) : 1,
MR RC KODEKAR APP for Opponent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 15/09/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

1. Both these appeals are directed against the judgment dated 10.8.1993 in Sessions Case No.232 of

1992 passed by the learned Additional Sessions Judge, Mehsana.

2. Criminal Appeal No.977 of 1993 is filed by Asgarbhai Subanji Zalori(original accused No.1) challenging his conviction for the offences punishable under Section 302 read with Sections 147, 148, 149 of the Indian Penal Code, 1860 (IPC) and also under Section 135 of the Bombay Police Act and sentencing accused No.1 to life imprisonment and fine of Rs.3,000/-, in default, rigorous imprisonment for six months. Criminal Appeal No.1235 of 1993 is filed by the State against the same judgment acquitting original accused Nos.2 to 5 charged with the aforesaid offences.

3. The prosecution case is that, on 3.7.1992 at about 6.15 p.m., the accused with the common object of causing death of Shailesh R.Bhatt were armed with lethal weapons like gupti, knife and dagger and when Shailesh Bhatt was on the road opposite the General Post Office in Siddhpur, all the accused, with a view to achieve their common object, came in a Maruti van and inflicted fatal blows on Shailesh Bhatt with sharp-edged weapons like gupti, knife and dagger and caused grievous hurt and inflicted such injuries which resulted into death of Shailesh Bhatt (hereinafter referred to as 'the deceased'). The First Information Report at Exh.58 was lodged by Rakeshkumar on the same day at about 10.00 in the evening, wherein the complainant disclosed the name

of accused No.1 and stated that there were four other Muslim persons who had assaulted the deceased with weapons. Accused No.1 was arrested at 5.00 in the morning on 4.7.1992 and accused Nos.2 to 4 were arrested at about 10.30 p.m. on the same day. Accused No.5 was thereafter arrested on 6.7.1992. Identification parade was held on 9.7.1992 in presence of the Mamlatdar of Siddhpur. All the accused were charged with the offence punishable under Section 302 read with Sections 147, 148 and 149 of the IPC, but pleaded not guilty.

4. At the trial, the witnesses examined by the prosecution were mainly PW.3 complainant-Rakeshkumar at Ex.26 who was an eye witness to the incident; PW.4 Police Constable Somabhai Parmar at Exh.29 and PW.5 D.N.Mali at Exh.30 both of whom also claimed to be eye witnesses. Amratlal B.Raval (PW.6) was the Mamlatdar who conducted the identification parade and who was examined at Exh.31. The medical officer who conducted the postmortem was also examined and the postmortem report was produced at Exh.21. Several panch witnesses were also examined to prove the panchnamas for discovery of the weapons from the accused. The report of the F.S.L. and the serological analysis reports were produced at Exhs.17 and 18 respectively. PW.14 P.B.Pandav, Circle Police Inspector, who took over the investigation of the offence in question at 1 o' clock in the early hours of 04.7.1992, was examined at Exh.55.

5. After considering the oral and documentary evidence on record, the learned Additional Sessions Judge, Mehsana, by his judgment and order dated 10.8.1993, convicted accused No.1 of the offences punishable under Sections 302, 147, 148 and 149 of the I.P.C. and sentenced him to suffer life imprisonment but, at the same time, the learned trial Judge acquitted accused Nos.2 to 5 of the offences with which they were charged by giving them the benefit of doubt. It is against the aforesaid judgment and order that accused No.1 has filed the appeal against his conviction and the State has filed acquittal appeal qua accused Nos.2 to 5.

6. Before proceeding further, we may refer to the order dated 25.11.2003 in which this Court had noted that when accused No.1 was released on temporary bail in the month of April 1995, he absconded for a period of more than six and half years and when his appeal became ripe for hearing, he surrendered on his own. The Division Bench then hearing conviction appeals, therefore, directed that in view of the above conduct on the part of the appellant-accused No.1, Criminal Appeal No.977 of 1993 was not required to be heard along with the other appeals of 1993 and that the appeal be heard after four years i.e. In November, 2007.

Learned A.P.P.Mr.Kodekar submitted that the State has filed Criminal Appeal No.1235 of 1993 against acquittal of accused Nos.2 to 5 and,

therefore, delay in hearing the conviction appeal filed by accused No.1 also results in delay in hearing the acquittal appeal filed by the State. We, therefore, acceded to the request of the learned A.P.P.to take up both the appeals for hearing.

7. Mr.Jhala, learned counsel for accused No.1-appellant in Criminal Appeal No.977 of 1993, has made the following submissions:-

(i) Presence of the complainant at the scene of offence is also doubtful because of the delay in filing the F.I.R. The incident in question took place at about 6.15 p.m., but the complaint was lodged at 10.00 p.m., even though the police sub inspector and the police constable were stated to have reached the scene of offence immediately at the time of the incident or immediately after the incident.

(ii) There are several contradictions in the evidence of complainant PW.3-Rakeshkumar. Apart from several improvements and exaggerations made by the said witness in his oral evidence over his complaint at Exh.58, the evidence of the complainant is also contradicted by the evidence of other prosecution witnesses, like police constable Mr.Somabhai (PW.4) and police sub inspector Mr.Mali (PW.5).

(iii) The learned trial Judge has committed an error in holding that the gupti recovered from accused No.1 had bloodstain marks with blood group matching that of the deceased.

(iv) There are several lacuna in the investigation. The scooter on which the deceased was allegedly riding and the Maruti van in which the assailants reached the scene of offence were not seized.

8. On the other hand, Mr.R.C.Kodekar, learned A.P.P. has supported the judgment of the trial Court insofar as the conviction of accused No.1 is concerned, and further made submissions to challenge the order of acquittal of accused Nos.2 to 5.

We will enumerate the grounds of acquittal later. First we will take up the submissions made by the learned counsel for the appellant-accused No.1 in the appeal challenging his conviction.

9. First taking up the ground of delay in lodging the F.I.R., it is true that the incident in question took place at about 6.15 p.m. on 3.7.1992, whereas the complaint was lodged at 10.00 p.m. It is also true that the prosecution case was that police constable Somabhai and police sub inspector Mr.Mali had reached the scene of offence immediately after the assault on the deceased. However, we do not find any infirmity in the explanation given by the complainant-Rakeshkumar that the assailants inflicted severe blows with weapons like gupti and knife on the helpless and hapless victim who succumbed to the injuries (27 as per the postmortem report). The complainant having got scared ran away from the scene

of offence. He rushed to the residence of the deceased whom he was already knowing. At the residence of the deceased, the complainant informed the elder brother and other family members of the deceased that Shailesh (deceased) was assaulted by Muslims near the General Post Office and that the complainant knew one of them being Asgarbhai (accused No.1) and that the other four persons could be identified by him. All the family members of the deceased, therefore, rushed to the hospital where the deceased was declared dead. The complainant was also in the hospital and police sub-inspector Mr.Mali was recording statements in connection with the other incidents which had taken place that afternoon. The complaint was recorded by the police sub inspector at about 11.00 p.m.

Police Sub Inspector Mr.Mali (PW.5) also stated in his evidence at Exh.30 that, when the complainant met the said witness at about 8.15 p.m., the complainant was trembling with fear. Realizing that the complainant was scared, this witness told him that the complainant could give the complaint a little later. The complainant moved around with the said witness only and when the said witness i.e. the police sub inspector found that the complainant had come out of his fear, this witness recorded the complaint. This witness also stated that about seven incidents had taken place on that day and he had recorded complaints in all those cases.

Looking to the aforesaid explanations offered by police sub inspector Mr.Mali (PW.5) as well as the complainant (PW.3), we are of the view that there was no unreasonable delay in lodging the F.I.R. It also transpires from the record that since a number of violent incidents had taken place in Siddhpur town from 03.00 p.m. Onwards on 3.7.1992, curfew was clamped on Siddhpur town at about 6.00 p.m. in the evening and, therefore, the conduct on the part of the complainant in running away from the scene of offence and going to the house of the deceased to inform his relatives and all of them going to the hospital and the police sub inspector recording the complaint of the complainant after he came out of the fear psychosis, are sufficient to explain the time gap of about four and a half hours between the time of the incident and the time of lodging the FIR.

10. Coming to the contention that the complainant had made several exaggerations and contradictions and that his evidence did not inspire confidence, the aforesaid background explaining the incident is sufficient to indicate that at the time of lodging the F.I.R., the complainant was basically giving the first information about the crime and, therefore, absence of details, which were subsequently disclosed at the time of deposition before the Court, cannot throw doubt on the genuineness of the complaint at Exh.58. The complaint at Exh.58 gives details about the time and

place of the incident. The complaint further describes that five persons had assaulted the deceased with blows by lethal weapons like daggers and that this witness was shocked on watching the sudden assault by five persons on the deceased.

10.1 The general description of the weapon, i.e. chharao (daggers) does not mean that subsequent detailed description given by the complainant that the accused were inflicting blows with gupti, knife and dagger was an improvement casting doubt on the genuineness of the complaint itself. Apart from the weapons, the complainant specifically gave the name of accused No.1 and also explained that accused No.1 was running a pan galla near Ashok Cinema and that is how he knew accused No.1. At the time of lodging the complaint, the complainant did not know the names of other accused persons, but he knew that all the five persons were muslims and that the first blow was given by accused No.1.

10.2 In the cross-examination of this witness, his evidence was sought to be shaken by challenging the complainant's case that he knew the deceased and his family members and also that the complainant knew accused No.1. Siddhpur is a small town where it would not be improbable for one resident in the town to know another resident. Merely because the complainant was not related to the deceased, it would not mean that the complainant did not know the deceased and his family members. The very fact that the

complainant not only went to the house of the deceased and informed his family members but also accompanied them to the hospital where the dead body of the deceased was lying would show that the complainant was already knowing the deceased and his family.

10.3 An attempt was made to show that the complainant was a got-up witness because the complainant's brother is a practicing advocate at Siddhpur. This suggestion is, to say the least, most unreasonable. There is nothing on record to show as to why the complainant or his brother (a practicing lawyer) would falsely involve accused No.1 whose name was disclosed in the complaint right at the outset. Merely because the complainant's brother, a practicing lawyer, had applied for getting copies of the criminal cases against the accused cannot be a ground to disbelieve the complainant.

10.4 Much was sought to be made against the version of the complainant that the deceased was wearing a helmet while riding scooter and when the deceased overtook the complainant, the complainant could not have identified the deceased. The complainant's case is that after making collection of monies in connection with his business in Bindu Sarovar area, at about 5.45 p.m. he was returning towards L.S.High School and the deceased was also going from the same direction towards Ashok Cinema when a Maruti van came from the direction of Ashok

Cinema, stopped in front of the scooter on which the deceased was riding, five persons came out of Maruti van and inflicted blows with sharp weapons, like dagger on the deceased and after giving several such blows, those assailants were dragging the deceased towards the road side in the direction of Nava Vas. In his cross-examination, the complainant gave description of the weapons being carried by the assailants. The very fact that the panchnama of the scene of offence at Ex.35 recorded on the next day shows that a helmet was found at the scene of offence, is sufficient to indicate that during the assault the helmet did not remain on the head of the deceased. It was, therefore, but natural for the complainant, who already knew the deceased beforehand, to identify the deceased.

10.5 As regards the alleged contradiction about the deceased not having heard about the fire-arm shot and not referring to it in the F.I.R., as already indicated earlier, at the time of lodging the F.I.R., the complainant was required to give broad facts of the incident. Since the complainant had seen five assailants, including accused No.1, inflicting blows by sharp weapons like dagger on the deceased, the sound of a rifle shot fired by a police constable in the air had no relevance to the facts constituting the crime. It transpires from the evidence of the complainant that the complainant heard the sound of rifle shot when he was running away from the scene of offence after the assailants inflicted blows (as

many as 27 as transpires from the postmortem report) on the deceased when the assailants were dragging away the body of the deceased. In this set of circumstances, not mentioning about the fire-arm shot in the complaint cannot be said to be a contradiction, much less a material contradiction. So also, the statement made by the complainant that after the assailants had taken the deceased towards roadside, they had escaped in a Maruti van towards Nava Vas, was explained by the complainant in his cross-examination.

10.6 In view of the above discussion, we do not find any doubt having been made out by the defence in the cross-examination of the complainant. On overall assessment of the evidence of the complainant, we find that his evidence does inspire confidence and the defence has not been able to point out anything to show as to why the complainant would falsely involve accused No.1 in the crime in question.

11. The learned counsel for accused No.1 further submitted that the learned trial Judge has based conviction of accused No.1 also on the ground that the gupti which was discovered at the instance of accused No.1 as per the panchnama at Exh.37 on 10.7.1992 had bloodstains with blood-group matching that of the deceased, but serological report at Exh.17 does not support the said finding.

It appears that two guptis were discovered- one from accused No.1 (Mark H-1) and the other from accused No.5 (Mark K-1). The serological report at Exh.17 (Page 72) indicates that blood-group of the deceased was 'O' group and the gupti at Mark K-1 also had bloodstains of 'O' group, but the bloodstains on the rusted gupti at Mark H-1 had human blood but the group could not be ascertained. Even proceeding on the basis that the serological report does not indicate any blood-group for the bloodstains found on the gupti at Mark H-1, that does not detract from the version of the eye witness-complainant Rakeshkumar (Ex.26) that he had seen the assailants led by accused No.1 inflicting blows on the deceased with sharp edged weapon. As already indicated earlier, the eye witness account of the complainant has stood the test of cross-examination and we have found the evidence of the complainant to be credit-worthy.

12. As regards non-seizure of the scooter on which the deceased was riding at the time of the incident, nothing could turn upon non-seizure of that vehicle because the fact that the incident in question took place opposite the General Post Office in Siddhpur and that the deceased was assaulted with sharp-edged weapons in the same area is not disputed. Merely because blood-marks were found at a distance of 28 ft. from the road does not mean that the deceased was not assaulted at the place opposite the General Post Office. If the pool of blood is found at the place near the road side and not actually on

the road, it would not mean that the deceased had not gone near the General Post Office. Non-seizure of the scooter, therefore, does not affect the prosecution case.

As far as seizure of Maruti van is concerned, it may be that seizure of Maruti van would have made the prosecution case foolproof, but when the evidence of the eye witness has been accepted as credit-worthy, any such defect in investigation does not dilute the finding of guilt against the accused.

13. In view of the above discussion, we do not find any merit in any of the contentions raised on behalf of accused No.1. The appeal against conviction of accused No.1, therefore, deserves to be dismissed.

14. Coming to the appeal filed by the State against acquittal of accused Nos.2 to 5, Mr.R.C.Kodekar, learned A.P.P. has heavily relied upon the depositions of PW.4 police constable Somabhai and PW.5 police sub inspector Mali, both of whom claimed to have seen all the five accused dragging the body of the deceased after assault.

The learned trial Judge did not accept the version of these two police witnesses on the ground that, if the said police officers had seen all the five accused at about 6.15 p.m. on 3.7.1992, there

was no reason for the said police officers not to disclose this fact by reducing it in writing and that too when the complainant had lodged his F.I.R. at about 11.p.m. specifically giving name of accused No.1 and mentioning presence of four other assailants. Apart from not reducing the names of the other four accused into writing in the evening of 3.7.1992, even on 4.7.1992, it was only at about 9.00 p.m. in the evening that for the first time police constable Somabhai (Ex.24) disclosed the names of accused Nos.2 to 4. The learned trial Judge has observed that it was after arrest of accused No.1 in the morning of 4.7.1992 that the investigating agency appeared to have gathered the names of accused Nos.2 to 4 during investigation, and therefore, the names of the aforesaid accused Nos.2 to 4 came out through the statement of police constable Somabhai (PW.4). The learned trial Judge has further held that till Somabhai gave statement late in the evening of 4.7.1992 and even at that time also, the name of accused No.5 was not disclosed and it was after accused No.5 was arrested on 6.7.1992 that the statement of police sub inspector Mr.Mali was recorded by the investigating officer disclosing the names of all the five accused persons. The learned trial Judge, therefore, did not accept the version of these two police witnesses that they had seen all the five accused at the scene of offence attempting to carry away the body of the deceased. The learned trial Judge, therefore, did not rely on the panchas for discovery of the weapons from accused Nos.2 to 5.

15. Mr.R.C.Kodekar, learned A.P.P.has submitted that there was no justification for not accepting the version of these two police witnesses and that the delay in not disclosing the names of accused Nos.2 to 5 ought to have been seen in the context of the situation then prevailing in Siddhpur town when sudden communal riots had broken out and the police officers were busy maintaining law and order.

16. It is true that communal riots had broken out in Siddhpur town and seven stabbing incidents had already taken place on 3.7.1992. It is also true that police sub inspector Mr.Mali had to go to the hospital for recording statements of victims and others. But when police sub inspector Mr.Mali himself recorded the F.I.R. of the complainant at 11.00 p.m. on 3.7.1992, when the complainant could disclose the name of only accused No.1, even after mentioning that there were five assailants and if police sub inspector Mr.Mali had seen the five accused, nothing prevented Mr.Mali from putting all the five names on the record. It is true that police sub inspector Mr.Mali was the investigating officer and if he had any slightest embarrassment, as contended by the learned A.P.P., in importing his personal knowledge into the F.I.R., that embarrassment could not have lasted beyond 1.00 a.m. in the morning of 4.7.1992 when circle police inspector Mr.Pandav took over the investigation. Even if police sub inspector Mali and police constable Somabhai were busy with maintaining law and order in Siddhpur town after the outbreak

of communal riots, non-disclosure of the names of accused Nos.2 to 4 till 9.00 p.m. on 4.7.1992 and that of accused No.5 till 6.8.1992 are circumstances which do throw reasonable doubt on the truthfulness of the version of the two police witnesses.

17. Apart from the above doubt, when we are called upon to set aside the finding of acquittal recorded by the trial Court, we have to bear in mind the principles laid down by the Apex Court in a catena of decisions about the power of the appellate Court hearing appeals against acquittal. **In HARIJANA THIRUPALA AND OTHERS v. PUBLIC PROSOECUTOR, HIGH COURT OF ANDHRA PRADESH reported in AIR 2002 SC 2821,** the Apex Court has held as under:

> *".....In our administration of criminal justice an accused is presumed to be innocent unless such a presumption is rebutted by the prosecution by producing the evidence to show him to be guilty of the offence with which he is charged. Further if two views are possible on the evidence produced in the case, one indicating to the guilt of the accused and the other to his innocence, the view favourable to the accused is to be accepted. In cases where the Court entertains reasonable doubt regarding the guilt of the accused, the benefit of such doubt should go in favour of the accused."*

In **STATE OF RAJASTHAN v. RAJA RAM reported in (2003) 8 SCC 180** also, the Apex Court has held as under:

> *".....If two views are possible, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The principle to be*

followed by the appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference."

18. Having gone through the evidence on record and the judgment of the trial Court, we find that the view taken by the trial Court is a plausible view and we would not be justified in substituting the said view merely because we could, or might, have taken a different view if we were sitting as the trial Court.

19. In view of the above discussion, we do not find any merit in the acquittal appeal filed by the State.

20. In the result, both Criminal Appeal No.977 of 1993 and Criminal Appeal No.1235 of 1993 are hereby dismissed. Bail bonds of accused Nos.2 to 5 shall stand discharged.

Sd/-

(M.S.SHAH, J.)

Sd/-

(D.H.WAGHELA,J.)

(KMG Thilake)